action at least at this summary stage. Whether or not the contentions of the defendants can be substained can only be resolved when this case goes on trial.

There is one final matter which I should mention. The plaintiff averred in the affidavit of Jeyabalan that the plaintiff entered into the tenancy agreement of the said premises mainly because of its strategic location which is of great advantage to the business of the plaintiff. This has not been seriously challenged by the defendants. For this reason it is therefore contended that damages cannot be an adequate remedy. To this proposition I agree. There is also no suggestion that should the plaintiff ultimately fail to sustain his right to the injunction they would be in no position to honour their undertaking to pay damages.

For the above reasons I am satisfied that the interim injunction granted to the plaintiff should not be revoked in order to give effect to the maintenance of the *status quo* pending the trial - see *Gan Realty Sdn. Bhd. & Ors. v. Nicholas* [1969] 2 MLJ 110, *Yeap Mah Ee v. Kuan Kim Chiew & Anor.* [1988] 2 MLJ 389 and *Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor.* [1990] 2 MLJ 408. The application of the defendants to strike out the writ of the plaintiff is likewise dismissed.

Costs of the proceedings are to be paid by the defendants to the plaintiff.

WAGON ENGINEERING SDN. BHD.

v.

SULAIMAN BULON SEMENANJONG ENTERPRISE SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. C23-2918-86]
21 NOVEMBER 1992

CONTRACT: Claim for breach of contract - Whether contract valid - Order form signed - No ambiguity in terms - Whether defendant entitled to cancel purchase - Measure of loss - Whether reasonable.

The plaintiff sued the defendant for losses suffered as a result of the defendants refusal to take delivery of five units of bulk cement tankers which had been specifically fabricated by the plaintiff in accordance with the defendant's specifications.

The terms of the contract was evidenced by the plaintiff's order form which was signed by the General Manager of the Transport Division of the defendant's parent company (PW2) and the plaintiffs' Sales Manager.

Upon the defendant's breach, the plaintiffs sold the tankers to mitigate their losses and sued for the difference between the contract price and the sale price.

The defendant claimed, firstly, that PW2 had no authority to sign the Order Form and, secondly, that the loss suffered by the plaintiff was unreasonable.

Held:

[1] PW2 was the officer in charge of the defendant and there was no merit to the defendants' allegation that PW2 had no authority to sign the Order Form.

[2] The contract was completed once the defendant signed the Order Form which described in great detail the equipments to be purchased, the price agreed and mode of payment. The defendant's failure to take delivery was a breach of contract.

[3] The plaintiff had done everything possible to mitigate their losses and the amount claimed was fair and reasonable.

[Plaintiffs claim allowed with costs].

For the plaintiff - Liza Chan Sow Keng (Selva with her); M/s. Liza Chan & Co.
For the defendant - Rosli Abdul Rahman; M/s. Yusoff Shamsuddin & Partners

JUDGMENT

Siti Norma Yaakob J:
In this breach of contract suit, the plaintiff's claim represents the loss suffered as a result of the defendant's refusal to take delivery of 5 units of bulk cement tankers which had been specifically fabricated by the plaintiff in accordance with the defendant's specifications.

The purchase of the 5 units is evidenced by the plaintiff's Order Form, AB25, dated 5 March 1985, which sets out the description of the 5 units and their total price. The Order Form is signed by PW2, the General Manager of the Transport Division of Emastulin Automobile Sdn. Bhd., the defendant's parent company. It is not disputed that the defendant became one of the Transport Divisions of Emastulin when the shares of the former were purchased by the latter pursuant to an agreement dated 2 November 1984, AB3-9. AB25 is countersigned by PW1, the plaintiff's Sales Manager.

The construction of the 5 units was completed in June 1985, but despite several reminders to the defendant to take delivery of the tankers as seen from AB43 dated 16 October 1985, AB46 dated 5 November 1985, and AB48 dated 5 May 1986, the defendant failed to do so. They maintain that they had already cancelled the purchase in April 1985 and that the plaintiff had been notified of such a cancellation.

To mitigate their losses, the plaintiff sold the 5 units to Lian Hin Trading & Transport Co. (Lian Hin) and Perkasa Perkayuan Sdn. Bhd. (Perkasa) at prices well below the contract price and it is the difference of the contract price and the sale price which the plaintiff now claims as representing the loss suffered following the defendant's breach of AB25.

The facts of this case are in no way disputed but, nonetheless, the defendant deny liability and have raised 2 defences:

(1) that PW2 had no authority to sign AB25.
(2) that the loss suffered by the plaintiff is unreasonable.

Minutes of the defendant's board meeting held on 23 March 1985, and appearing at AB39, show that the defendant had resolved to purchase the 5 units, together with 5 other units of oil palm tankers, for the use of Emastulin's other transport division, Lachman Singh & Sons Transport Service Sdn. Bhd. Thus the authority to purchase the 5 units is clear and is in no way in doubt. As the officer in charge of the defendant, there is also no merit to the defendant's allegation that PW2 had no authority to sign AB25. It is true that he was not a Director of the defendant but PW2 has testified that he was instructed by DW1, the General Manager of Emastulin, the defendant's parent company, to make the purchase and this is further confirmed by DW1 himself when he testified that the officer responsible for the purchase was PW2.

It is also the evidence of PW2 that just 4 months after the defendant had resolved to purchase the 5 units of cement tankers and 5 units of oil palm tankers, the Board of Lachman Singh & Sons Transport Service Sdn. Bhd., the other transport division of Emastulin, met on 8 July 1985, and reviewed the purchase of the 10 tankers and because of the prevailing business condition, decided to cancel the purchase altogether. The fact of this cancellation is evidenced by AB41, the minutes of the board meeting. Following this, on 12 November 1985, PW2 sent AB47 to DW1, the General Manager of Emastulin, recommending that DW1 speak to the plaintiff to seek a cancellation of the purchase. It must be remembered that at this point of time, the construction of the 5 units was already completed and written demands had already been made by the plaintiff to the defendant to take delivery of the units. In AB47, PW2 had enclosed the plaintiff's written demands for DW1's attention. DW1, however, did not respond to AB47 but, instead, sent AB49 dated 15 May 1986, in response to the plaintiff's last letter of demand at AB48, stating that the purchase of the 5 units had already been cancelled in April 1985 and this decision should have been communicated to the plaintiff.

The plaintiff deny any such communication and when he was cross-examined on this, DW1 testified that it is possible that AB49 was the first letter sent to the plaintiff informing them of the cancellation of the orders.

In the light of such evidence, there is every possibility that no such communication was ever made to the plaintiff and, in any event, the cancellation has no effect whatsoever as the

contract has been completed once the defendant had signed on AB25. This Order Form contains no ambiguity. It describes in great detail the equipments to be purchased, the price agreed and the mode of payment to be made. The fact that the recession had set in to prevent the defendant from honouring their obligations under the contract cannot afford a defence to them. On that finding, the defendant had clearly breached AB25.

The 5 units had been specially fabricated to the defendant's specifications appearing at AB29-30 and for this very reason, I accept the plaintiff's contention that finding buyers for them proved to be a difficult one. In any event, there is evidence to show that through P1, the plaintiff's invoice dated 31 October 1988, the plaintiff sold one unit to Lian Hin for RM10,700. The 4 remaining units have been purchased by Perkasa, 2 in December 1989 as evidenced by P2 and P3, one unit in September 1990 as evidenced by P4 and the last unit has yet to be delivered to Perkasa. This last purchase is evidenced by P5 and P6.

The unit price of the 4 tankers sold to Perkasa was RM25,900 and the total purchase price received by the plaintiff by the sale to Lian Hin and Perkasa came to RM114,300, well below the contract price of RM325,500 as stated in AB25.

This has prompted the defendant to question the amount of the proceeds of sale as being too low and apart from stating that the plaintiff could have obtained a better price, no evidence was produced how much more the 5 tankers could have fetched in the open market. In the light of the recession then prevailing and the fact that the tankers were custom made, the plaintiff had done everything possible to mitigate their losses and the fact that they only managed to obtain RM114,300 for them is no reflection to their inability to obtain buyers who could have offered more. It was just a case of there being no buyer able and willing to offer more.

In AB25, the contract price of RM325,500 is inclusive of 7 other charges for which the plaintiff makes no further claim in this suit, as such charges were never incurred by them. This reduces the contract price to RM265,000 and it is the difference of this contract price with the sale price which the plaintiff now claims as being the loss suffered following the defendant's breach. As this loss amounting to RM150,700 represents the actual financial loss suffered by the plaintiff, I consider this amount to be fair and reasonable and to that end, entered judgment for the plaintiff as against the defendant for the sum of RM150,700 with interest at 8% per annum from 13 September 1986 (the date when this suit was filed), to date of realisation, and costs.